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SOME GENERAL OBSERVATIONS ON THE PENALTY OF DEATH.

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A primary object to be kept in view, in considering the question of Capital Punishment, is the nature of its ultimate and general tendency, whether to increase or decrease homicidal crime. And in connection with this, constant regard must be had to that fundamental principle of Penology, that certainty is a more efficacious element in punishment than extreme severity.

As regards the presumptively deterrent character of the Death Penalty there is great diversity of opinion amongst practical persons. Indeed, absolutely opposite conclusions have repeatedly been arrived at by men of similar authority and experience. For example, the eminent jurist, SIR J. FITZJAMES STEPHEN, declared before the ROYAL COMMISSION of 1865—"I think that Capital Punishment deters people from crime more than any other punishment, and that it deters them in two ways. I think that the effect of it is appreciable—and in some cases considerable—in a direct and ordinary manner; that is to say, when a man is going to commit a crime, he thinks, 'If I do this, I shall be hanged for it.' But besides that, there is a secondary effect of Capital Punishment. People are aware that murder is punishable by an ignominious expulsion from the world. They therefore get to consider murder as a very dreadful thing." Another experienced Judge, SIR GEORGE DENMAN, told the same Royal Commission, "My own feeling is that the law of Capital Punishment, as it exists, does not operate at all; and that if you take the various classes of murderers, there is more, on the whole, done by Capital Punishment to induce murders, than there is to prevent them."

Now, unquestionably, there is some ground for each of these diverse opinions. But the writer ventures to think that they are reconcilable both with each other, and with a final conclusion as to the weakness of Capital Punishment, when the following consideration, urged in his own evidence before the same COMMISSION, is taken into account. He said:—"I believe that the punishment of death is the most deterrent punishment possible to a certain class of minds, *provided* it be inflicted with absolute certainty; but I submit that that is merely an imaginative and theoretical condition, and that Capital Punishment never is, never has been, and we may reasonably conclude never will be, inflicted with absolute certainty.

"But (he added) on the other hand, I would also submit that there is another class of crime which altogether precludes the idea of any efficacious deterrence at all. I allude to the large proportion of homicidal crime which is committed under the influence of over-mastering passion, drunkenness, rage, or jealousy; there the argument of deterrence, which I admit in certain other cases, cannot apply at all."

If the punishment of death could be inflicted with as much certainty as prolonged imprisonment, then it might be more deterrent than the latter. But, as a matter of simple fact and experience, the world over, a number of circumstances, *special to this particular penalty*, conspire to render its infliction uncertain in a most extraordinary degree. Even in GREAT BRITAIN, where, perhaps, the law is carried out with less uncertainty than elsewhere, only about 25 per cent. of convictions result from committals for

trial in capital cases ; and then, further, nearly half of these convictions are finally followed by commutations. In other countries, generally, a still smaller proportion of executions result. The official statistics of the various nations prove this clearly and strikingly.

Whence comes this peculiar obstacle contributed by this one penalty to its own enforcement ? From several sources. Partly because it is a *fatal and irreversible* punishment. Hence the highest degree of certainty in evidence is reasonably demanded by jurors and by public opinion, in murder cases, where, at the same time, there is usually *less* certainty of evidence procurable than with any other crime. For murders are generally committed in secret, and the only real witness, the victim, is destroyed in most instances. So that where the most direct testimony is needful, only indirect or circumstantial evidence is, in general, obtainable as to the simple matter of fact.

In spite of the utmost care, it is known that even the strongest circumstantial evidence has sometimes led to the conviction and death of absolutely innocent persons. There is much reason to conclude that, for example, Wiggins, hanged in London in 1867, Hayes and Stone, of Durham, 1873, and two of the three men hanged at Leicester in 1877, with various others recently executed in foreign countries, were put to death by mistake. Others have been saved, after sentence, as by a hair's breadth, and ultimately shown to have been innocent, as in the cases of Polizzioni, of London, Habron, of Manchester, 1876, Alice Rhodes, of Penge, 1877, W. Siddle, of Durham, 1884, Travis, of Cheshire, 1889, and many more.

Again, even where the fact of murder may be clear enough, the deadly issue of the penalty often raises special pleas as to just responsibility, in connection with homicidal insanity. For it is an unquestionable matter of scientific demonstration that insanity and homicidal tendencies are peculiarly and frequently associated. The late DR. WILLIAM GUY, F.R.S. (Vice-President of the Statistical Society), published a comprehensive series of observations extending over thirty years, and proving his conclusion that, "Insanity plays a conspicuous part in the terrible drama of homicide." He shows that whereas the proportion of insane persons is less than two to every thousand of the whole population of England and Wales, the ratio of insane to sane criminals in general is 57 per 1000, but that amongst the particular class of criminals committed for murder, the proportion found insane is 145 per 1,000 (or $14\frac{1}{2}$ per cent.).

Juries who would willingly consign such unfortunate persons to prolonged imprisonment in a Lunatic Asylum, or even in a Prison, naturally shrink from finding a verdict which would send them to a death on the Scaffold, with its shame and horror. In such instances, again, the Capital Penalty often seriously defeats its own object.

And, in general, evidence is reasonably deemed sufficient to warrant a verdict resulting in imprisonment, when the same may not be felt to be adequate for a fatal and irreversible decision. In the event of subsequently discovered error, as to the former decision, some compensation can be made to the innocent, but not so in the latter case. Years ago, five men were arraigned before an English jury for a very atrocious murder. To the public astonishment and indignation, they were acquitted. One of the jury, on being privately remonstrated with, replied in substance, "We were almost certain of the guilt of the accused, but not quite. The law did not permit us to return a verdict of manslaughter, involving imprisonment. That we would have given. But we felt that nothing short of absolute certainty, which was unattainable under the circumstances of the case, would justify us in consigning five men to the irrevocable destiny of death. We, therefore, had no alternative, but to acquit them." A similar result has occurred in many cases. Thus the capital penalty tends to promote the escape of the guilty, and so to encourage murder.

In other words, the superior deterrence which, it may be admitted, attaches, in the abstract, to the death penalty, is practically counteracted, or nullified, by its unavoidable and special uncertainty of enforcement. That is to say, it has the (penologically) fatal defect of being *very weak in action*; whereas the crime of murder should have the *most vigorously certain* repression.

Even the special notoriety attendant on Executions and Capital Trials has a great attraction for many criminals, whose morbid vanity is excessive. But no such mischievous interest attaches to imprisonment. In the autumn of 1889, immense popular excitement was aroused by the death-sentences passed on a woman at Liverpool, and on a youth at Glasgow. Scores of thousands of persons signed petitions for commutations of those two sentences. When they were commuted, the excitement almost immediately disappeared. No other penalty, but that of death, produces such pernicious popular interest in murderers, or such interference with the enforcement of law. But this is *inevitable* whilst that particular penalty is retained.

An habitual prison visitor, remarks, as to the presumed superior deterrence of this punishment, in a book published by Messrs. Blackwood (Edinburgh, 1889), entitled "SCENES FROM A SILENT WORLD":—"We desire to state, in the strongest words we can use, that this argument in favour of the death penalty is absolutely and radically false. We do not make this assertion without warrant; our practical experience has been very extensive. Crimes of violence are for the most part committed, in the blind heat of passion, by persons who never give a thought to the penal consequences of the deeds to which they are driven by the frenzy of the moment. Apart, however, from this, there remains the fact, which we cannot assert too emphatically, that death is not the punishment which lawless men dread the most. Such men often fiercely desire death. They seek it; they look forward to it as the cure for all mortal ills—the sure and painless refuge from the agony of life."

In confirmation of the latter statement, it is noteworthy that the statistics of Suicide show that the number of persons who kill themselves are many times more than those who kill others.

No system whatever can be free from some difficulty or disadvantage, but there is much experimental reason to conclude that the punishment for murder which will best promote convictions, by securing the greatest attainable certainty of infliction, and with decidedly advantageous influences on the penal discipline of the criminal, is **TWENTY YEARS' IMPRISONMENT**, in safe seclusion, though not in absolute solitude. Cellular separation is one of the fundamental essentials for reformatory, as well as deterrent imprisonment, for *short* terms of confinement (even up to two or three years), but it is a positive barbarism if continued during life, or for long periods. In fact, such imprisonment may become simply another and worse mode of inflicting Capital Punishment, as "by inches." [On this subject, see a chapter in the writer's "PENOLOGICAL AND PREVENTIVE PRINCIPLES:" London, 1889, published by Messrs. Wertheimer, Lea & Co., price 8s.]

A fairly practicable substitute for Capital Punishment has long been adopted, by many nations, for the great majority of murderers. Even in **GREAT BRITAIN**, for example, this substitute *is already resorted to, for nearly half* of the murderers. In certain prisons in Holland, Belgium, Germany, Sweden, Norway, &c., may be found many murderers, in good health of body and mind, who have been under restriction for periods of twenty years and upwards. In **PORTUGAL** twenty years is the definite term awarded in lieu of Capital Punishment. This term is, in most cases, *virtually* a life sentence, whilst holding out a ray of hope to nearly all subjected to it. Thus it facilitates the discipline of the imprisoned, and also removes those difficulties in the way of conviction, which, as already shown, are inseparable from the capital penalty.

It is important to observe that in the countries which have adopted prolonged imprisonment, under reasonable conditions, as the punishment for murder, that crime has not increased in frequency, whereas the convictions of its perpetrators have materially increased. In HOLLAND no execution has taken place since 1860 ; in BELGIUM none since 1863 ; in FINLAND none since 1824 ; in ITALY none since 1876 ; in PORTUGAL none since 1843. Several AMERICAN STATES have also abolished the death penalty.

ITALY, however, has not adopted other measures needful to diminish murder. SWITZERLAND abolished Capital Punishment, and in 1879 accorded permission to the cantons to reimpose it. But the CHANCELLOR OF THE SWISS CONFEDERATION informs the Howard Association that, up to 1890, "not a single execution has taken place in Switzerland," since the nominal restoration of the penalty.

Much may doubtless be adduced in favour of, and in opposition to, either the death penalty, or its abolition ; but, on balancing the *pros* and *cons*, there appears a decided superiority of practical advantage in favour of the latter.

THE BIBLE also is often appealed to in both directions ; and it may fairly be quoted on either side. The Old Testament unquestionably permitted Capital Punishment for murder and for other crimes. But there were no suitable prisons, as a substitute, in those days. The New Testament did not expressly condemn the death penalty, yet neither did it expressly condemn SLAVERY, or POLYGAMY. But its *spirit* is opposed to these. The general Scriptural argument on this subject may be narrowed to this simple point : Is it right to put men to death, unless experience proves that it is absolutely necessary to do so ? Then the solution must depend upon the verdict of experience and history. God spared the life of the first murderer, though punishing him effectually. The Redeemer declared that He came "not to destroy men's lives, but to *save* them," both for time and eternity.

Lastly, it needs to be remembered that punishment, of *whatever* kind, is merely one out of many elements, in the suppression of murder, as of other crimes. The countries where murders are comparatively few are those where the two great influences of PREVENTION AND PUNISHMENT are each rendered efficacious. Of these the former is very much the more powerful. PREVENTION is chiefly secured by the promotion of RELIGION, EDUCATION, TEMPERANCE, and the prohibition of the use of WEAPONS by private citizens. Amongst the nations where these means are at least comparatively adopted, may be named Great Britain, Holland, Scandinavia, Finland, and Central Europe in general, with New England and the Northern and Eastern United States, also the British Colonies.

The districts where there are most murders are those where private citizens habitually carry weapons ; or where drunkenness specially prevails ; where punishment, of whatever nature, is comparatively uncertain ; or where ecclesiastical absolution is easily obtainable. Such countries are Corsica, Spain, Italy, the Levant, and the Southern States of America, where weapons are habitually carried by private persons. Capital Punishment is retained equally in Massachusetts and in Texas ; but the difference in the amount of homicide in the two States is immense, owing to the free use, in the latter, of the pistol and bowie knife. There are several hundred "lynchings" annually in the United States ; and nearly all of these occur in districts where the death penalty is retained. Sweden and Spain each inflict Capital Punishment ; but murders are more numerous in the latter than in the former, for reasons other than the nature of the penalty inflicted. Preventive means are, indeed, far more efficacious, everywhere, than those of a merely punitive character.